

Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya

Yvonne Dutton & Tessa Alleblas
Robert H. McKinney School of Law

Decades in the making, the International Criminal Court (ICC) now exists. The Preamble to the Rome Statute creating the court reflects the sentiments of many that the ICC will reduce mass atrocities and impunity for those who commit such abuses. The literature, though, reveals a clear divide amongst commentators as to whether or not the ICC can actually deter. Countering the ICC's supporters are the skeptics who charge that (1) the individuals targeted by the ICC are not rational actors who can be deterred and (2) that the court cannot send a strong deterrent signal since it can prosecute few offenders. Others are even more pessimistic, arguing that the insistence on international criminal justice may actually incentivize some perpetrators to commit abuses, thereby *impeding* prospects for peace. This Article takes issue with those who argue in an abstract fashion that the ICC can or cannot deter. We seek to reframe the debate to allow for a more nuanced understanding of the circumstances under which deterrence is more or less likely to occur. To illustrate the need to "unpack" the ICC's deterrent effect, we use a deep dive narrative-driven case study of Kenya and its relationship with the ICC over time. Unique to this study is novel data: information obtained during semi-structured interviews we conducted in Nairobi, Kenya during 2015 with high-level subjects, including former government officials, journalists, academics, and leaders in civil society and think tanks. Establishing with certainty a *causal* role for the ICC is difficult. Nevertheless, our interviews show how informed actors on the ground perceive the ICC's deterrent effect under varying circumstances and over time. Combined with documentary data about what happened in Kenya before and after it ratified the Rome Statute, this Article establishes a new model for evaluating and understanding the ICC's deterrent power.